# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

GREGORY JAMES MARTIN and WILLIAM THOMAS ALLAN,

Defendants-Appellees.

UNPUBLISHED
June 26, 2003

No. 244847
Oakland Circuit Court
LC Nos. 2002-183538-FH
2002-183539-FH

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Before: Markey, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

The prosecution appeals by leave granted the circuit court's order denying the prosecution's motion to amend the general information to reinstate the charge for conducting a criminal enterprise, MCL 750.159i. We affirm.

This interlocutory appeal is limited to the issue whether the district court erred in failing to bind over defendants to circuit court on the charge of conducting a criminal enterprise, MCL 750.159i. The prosecution argues that it presented sufficient evidence to establish the existence of an enterprise, and thus the rulings of the lower courts must be reversed. We disagree.

This Court previously has explained the standards of review concerning bind over decisions:

> A [district court's] decision to bind a defendant over for trial is afforded great discretion and will not be disturbed absent an abuse of discretion. *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997); *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). In reviewing the district court's decision to bind a defendant over for trial, a circuit court must consider the entire record of the preliminary examination, but may not substitute its judgment for that of the magistrate. *Orzame*, *supra* at 557. Reversal is appropriate only if it appears on the record that the district court abused its discretion. *Id*. Similarly, this Court reviews the circuit court's decision de novo to determine whether the district court abused its discretion. *Id*.; *People v Flowers*, 191 Mich App 169, 174; 477 NW2d 473 (1991). [*People v Crippen*, 242 Mich App 278, 281-282; 617 NW2d 760 (2000).]

Further, we review de novo issues of statutory interpretation. *People v Jones*, 467 Mich 301, 304; 651 NW2d 906 (2002).

A district court must bind a defendant over for trial if at the preliminary examination the prosecutor presents competent evidence constituting probable cause to believe that a felony was committed and that the defendant committed that felony. MCL 766.13; MCR 6.110(E); *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). In the present case, the prosecution sought to bind over defendants on the charge of conducting a criminal enterprise, MCL 750.159i, but the district court declined to do so, concluding that the evidence failed to establish an enterprise within the meaning of the criminal enterprise statute. Likewise, ruling on the prosecution's motion to amend the general information, the circuit court found that, based on the transcript from the preliminary examination, the evidence failed to show an enterprise, and thus denied the motion.

Michigan's criminal enterprise statute provides in pertinent part that "[a] person employed by, or associated with, an enterprise shall not knowingly conduct or participate in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity." MCL 750.159i(1). "Enterprise" is defined as "an individual, sole proprietorship, partnership, corporation, limited liability company, trust, union, association, governmental unit, or other legal entity or a group of persons associated in fact although not a legal entity. Enterprise includes illicit as well as licit enterprises." MCL 750.159f(a).[1]

Recently, in *People v Gonzalez*, 256 Mich App 212, 220; __ NW2d __ (2003), this Court noted that Michigan's criminal enterprises statute "was intended to create state racketeering law analogous to the Racketeering Influence and Corrupt Organizations Act (RICO), 18 USC 1961 *et seq.*" In addressing an evidentiary issue *Gonzalez, supra*, this Court relied on the view of the majority of federal circuits with respect to what needs to be established to prove an enterprise in RICO cases. *Id*. The majority view requires that the prosecution prove the existence of an ongoing organization with members functioning as a continuing unit and the enterprise must exist separate and distinct from its pattern of racketeering activity. *Id*., citing *United States v Chance*, 306 F3d 356, 372 (CA 6, 2002).[2] See also, e.g., *Chang v Chen*, 80 F3d 1293, 1297 (CA

[1] The statute defines racketeering as "committing, attempting to commit, conspiring to commit, or aiding or abetting, soliciting, coercing, or intimidating a person to commit an offense for financial gain, involving [a variety of criminal offenses]." MCL 750.159g. In order for the predicate acts of racketeering to be considered a "pattern of racketeering," the offender must have committed not less than two incidents of racketeering with specified characteristics. MCL 750.159f(c).

[2] More specifically, the prosecution must prove:

> "1) an ongoing organization with some sort of framework or superstructure for making and carrying out decisions; 2) that the members of the enterprise functioned as a continuing unit with established duties; and 3) that the enterprise was separate and distinct from the pattern of racketeering activity in which it engaged." [*Gonzalez, supra*, quoting *Chance, supra*.]

9, 1996); *United States v Neapolitan*, 791 F2d 489, 499-500 (CA 7, 1986); *United States v Tillett*, 763 F2d 628, 631-632 (CA 4, 1985); *United States v Riccobene*, 709 F2d 214, 221-223 (CA 3, 1983), overruled on other grounds by *Griffin v United States*, 502 US 46; 112 S Ct 466; 116 L Ed 2d 371 (1991); *United States v Bledsoe*, 674 F2d 647, 662-665 (CA 8, 1982). However, the minority view permits the organization constituting the enterprise to be no more than the sum of the predicate acts of racketeering. *Chang*, *supra*; see, e.g., *United States v Bagaric*, 706 F2d 42, 55 (CA 2, 1983), abrogated on other grounds by *Nat'l Org for Women, Inc v Scheidler*, 510 US 249, 259-260; 114 S Ct 798; 127 L Ed 2d 99 (1994); *United States v Cagnina*, 697 F2d 915, 921 (CA 11, 1983). Although at oral argument in the present case the prosecution urged us to request a conflict panel on this issue and advocate for the minority view, we decline its invitation because on the facts of the case before us, the prosecution failed to present sufficient evidence to establish an enterprise under either the majority or the minority view.[3]

Regardless of whether we apply the majority view or the minority view, here the prosecution failed to present sufficient evidence at the preliminary examination to bind defendants over on the criminal enterprise charge. The prosecution asserted that defendants and Terrence Wichman together formed the criminal enterprise. However, Wichman, a witness for the prosecution, testified that he had never met defendant Allan and that he never knew from whom defendant Martin got his marijuana. No evidence demonstrated that defendants and/or Wichman had any control over the affairs of the others. Rather, the evidence clearly indicates that defendants and Wichman were each sole proprietors looking out exclusively for his own interests. Wichman testified that he and defendant Martin never shared any equipment; that he and defendant Martin never pooled their money for a joint venture; that he and defendant Martin never shared profits; that he and defendant Martin never told each other to whom they could sell marijuana or what they could do with their marijuana. While none of these facts alone would tend to prove or disprove the existence of an enterprise, they do indicate that the parties were not "associated in fact," MCL 750.159f(a), and that no enterprise separate and distinct from the drug buys/sales existed. Moreover, the prosecution failed to show that the parties had any decision-making mechanism. In other words, there was no central authority or rule to bind the three participants together. Instead, each party was free to do with his money and marijuana whatever he pleased. Rather than demonstrate an enterprise, the evidence presented merely demonstrated typical drug buyer-seller relationships. Thus, we conclude that the district court did not abuse its discretion in refusing to bind defendants over on this charge.

Affirmed.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra

[3] We do note, however, we are somewhat in agreement with the prosecution that the minority view appears consistent with the legislative intent in Michigan.